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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JASON JIMENEZ, Defendant and Appellant.	B286710 Los Angeles County Super. Ct. No. BA452415

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jason Tran and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jason Jimenez was convicted of assault with a deadly weapon after stabbing his neighbor in the arm with a knife. He contends his Confrontation Clause rights were violated when the court erroneously found the victim and his wife unavailable and allowed their preliminary hearing testimony to be read at trial. He also argues the prosecutor committed misconduct by impugning defense counsel's integrity during rebuttal argument. We affirm.

PROCEDURAL BACKGROUND

By information dated January 6, 2017, defendant was charged with one count of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1); count 1) with great bodily injury (§ 12022.7, subd. (a)) and hate crime (§ 422.7, subd. (a)) allegations. Defendant pled not guilty and denied the allegations.

After a trial at which he did not testify, a jury convicted defendant of count 1 and found the great-bodily-injury allegation true—but found the hate-crime allegation not true.

The court sentenced defendant to four years in state prison. The court imposed the high term of four years for count 1 and stayed the great-bodily-injury allegation under section 654.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

In December 2016, defendant lived in an apartment complex in Los Angeles. Vivian Baucom and Alfredo Mejia also lived in the complex, and the three neighbors got along well.

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[1] All undesignated statutory references are to the Penal Code.

The evening of December 7, 2016, defendant brought a bottle of vodka to Mejia's and Baucom's apartment. After noticing that Mejia was holding a picture of Donald Trump, defendant said, "All Native Americans and Irish, including Donald Trump, should be killed and if I had the power, I would do it myself." Then he said, "fuck Donald Trump," "fuck Native Americans," and "fuck Irish Americans." Mejia was offended; he believed the comments were directed at him because defendant knew he was Irish and Native American. Defendant continued to make "a bunch of what seemed to be racial and terrorist type of comments" like "I hate your kind. Your kind should never be here in America. This was our land before it was yours." Mejia told defendant to "get the heck out of [our] room."

In response, defendant stabbed Mejia in the arm with a knife. Mejia kicked defendant, trying to force him out through the front door of the apartment. Ultimately, Mejia managed to get the knife away from defendant, and defendant ran out of the room. Defendant ran to his apartment, then fled in different clothing.

Baucom called 911, and paramedics arrived soon thereafter.[2] Baucom had been in the bathroom during the altercation, but she heard Mejia repeatedly ask defendant to leave. Baucom did not remember hearing any racial comments, however, and did not see defendant cut Mejia.

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[2] Baucom called 911 three times during the incident, reporting first that defendant would not leave her home, then that he had a knife, and finally, that he had stabbed Mejia.

Mejia, who had been using a t-shirt to stanch the bleeding, met the paramedics outside. The wound was deep enough to require 10 to 12 stitches and ongoing pain management.

A responding police officer saw blood spatter in the living room of Baucom's and Mejia's apartment and a trail of blood from the apartment to the paramedics. The officer collected the knife used in the attack, which Mejia identified.

DISCUSSION

Defendant contends that (1) his Confrontation Clause rights were violated when the court erroneously found Baucom and Mejia unavailable and allowed their preliminary hearing testimony to be read at trial, and (2) the prosecutor committed prejudicial misconduct by disparaging defense counsel to the jury during rebuttal argument.

1. There was no Confrontation Clause error.

1.1. Legal Principles and Standard of Review

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses. [Citations.] The right of confrontation 'seeks "to ensure that the defendant is able to conduct a 'personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' " [Citation.] To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling

"into question the ultimate ' "integrity of the fact-finding process." ' " [Citation.]' [Citation.]

"Although important, the constitutional right of confrontation is not absolute. [Citations.] 'Traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination ... ." [Citation.]' [Citation.] Pursuant to this exception, the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's confrontation right. [Citation.]

"This traditional exception is codified in the California Evidence Code. [Citation.] Section 1291, subdivision (a)(2), provides that 'former testimony,' such as preliminary hearing testimony, is not made inadmissible by the hearsay rule if 'the declarant is unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' Thus, when the requirements of section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation. [Citation.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 620–621, fns. omitted (*Herrera*).)

Here, there is no dispute that defendant was a party to the action in which Baucom's and Mejia's former testimony was given, and that he exercised his right to cross-examine Baucom and Mejia at the preliminary hearing with the requisite interest and motive. The question is whether Baucom and Mejia were unavailable as witnesses.

"A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial. [Citation.] The United States Supreme Court has described the good faith requirement this way: 'The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. "The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness. [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.' [Citation.]

"Our Evidence Code features a similar requirement for establishing a witness's unavailability. Under section 240, subdivision (a)(5) ..., a witness is unavailable when he or she is '[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.' " (*Herrera*, *supra*, 49 Cal.4th at p. 622, italics omitted.)

Ultimately, the burden is on the government to prove it has exercised good faith and due diligence in attempting to secure a witness's attendance for trial. (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, overruled on other grounds in *Crawford v. Washington* (2004) 541 U.S. 36.) On review, we defer to the trial court's factual findings if they are supported by substantial evidence, but we "independently review whether the facts demonstrate

prosecutorial good faith and due diligence." (*Herrera*, *supra*, 49 Cal.4th at p. 623.)

1.2. The prosecution was sufficiently diligent.

As discussed, a witness is not unavailable for Confrontation Clause purposes unless the prosecution can prove, by a preponderance of the evidence, that it exercised good faith and reasonable diligence in attempting to secure the witness's presence at trial. (*Herrera*, *supra*, 49 Cal.4th at pp. 621–623.) "The term '[r]easonable diligence, often called "due diligence" in case law, " 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' " ' [Citation.] Considerations relevant to the due diligence inquiry 'include the timeliness of the search [for the witnesses], the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' [Citation.]" (*Id.* at p. 622.)

On August 16, 2017, at 9:40 p.m., the prosecution personally served Mejia and Baucom with subpoenas directing them to appear in court the next morning at 8:30. The witnesses were "irate and reluctant to follow through with the subpoenas."

On August 17, 2017, the prosecutor announced ready for trial—but since Mejia and Baucom had not appeared, she asked the court to issue and release bench warrants for their arrest. The court complied with the prosecutor's request, and bail was set at $30,000 for each witness.

On August 21, 2017, when the witnesses still had not appeared, the court held a hearing to determine whether they were unavailable for Confrontation Clause purposes. The court heard testimony detailing the prosecution's attempts during the previous week, then held that the prosecution had exercised reasonable diligence, and the witnesses were unavailable.

Defendant does not challenge these post-subpoena efforts. That is, he does not argue that after bringing the witnesses under subpoena, the prosecution was insufficiently diligent in attempting to get them to appear in court.[3] Instead, he argues that the prosecution acted unreasonably by not serving the witnesses with subpoenas earlier. In support of that claim, defendant notes that between July 5, 2017, the original trial date, and August 17, 2017, when both sides announced ready, the prosecution received six continuances over as many weeks—often over defense objection—yet made no effort to serve Mejia and Baucom with subpoenas during that time.[4]

Yet, during that period, Mejia was in the hospital,[5] and the prosecution kept careful tabs on his condition and whereabouts. For example, on July 17, 2017, three days before the second trial date, the prosecutor spoke to Baucom, who told her that Mejia had recently undergone three surgeries, was currently hospitalized, and was very ill. A district attorney investigator visited Mejia in the hospital the next day; he verified that Mejia looked unwell and was not expected to return home for at least a week.

On August 4, 2017, four days before the third trial date, the prosecutor spoke to Baucom again. Baucom told her that Mejia had been home for four or five days the week before, but was readmitted on August 2, 2017, due to an infection. A few days

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[3] Accordingly, we do not discuss those efforts in detail and offer no opinion on their reasonableness.

[4] Defendant does not argue that the court erred by granting these continuances or claim that his speedy trial rights were violated.

[5] Mejia's hospitalization was unrelated to the stabbing at issue here.

after that phone call, on August 7, 2017, another district attorney investigator went to the hospital and learned that Mejia had been placed in the intensive care unit.

On August 9 and 10, 2017, the prosecutor left four voicemail messages for Baucom, which were not returned. So, on August 10, 2017, a district attorney investigator went back to the hospital to verify that Mejia was still there. The investigator spoke to Mejia's doctor, and learned Mejia had a blood disorder—but could be discharged in a few days, depending on the results of a pending blood test.

Later that day, however, the doctor called the investigator to report that, based on Mejia's test results, he would have to remain in the hospital for another week or so. The next day, August 11, 2017, the prosecutor called the doctor herself and confirmed the prognosis and expected discharge date.

On August 16, 2017, the prosecutor called the charge nurse and learned that Mejia had been released two days before (four days earlier than expected), on August 14, 2017. The prosecutor immediately requested personal service of subpoenas for Mejia and Baucom, who were served late that night, as discussed above.

Defendant contends it was unreasonable for the prosecution not to serve Mejia and Baucom with subpoenas during this period. We disagree.

Serving Mejia during his hospital stay would have been fruitless. He was undergoing multiple surgeries, had suffered an infection, and was in and out of the intensive care unit. Since he was the key witness in this matter, his availability was paramount—and he was plainly unavailable. Nor does the record support an inference that Mejia was uncooperative at that

juncture or that he would refuse to appear in court once he was well.

Certainly, as defendant suggests, Baucom was apparently available to testify during this period: She wasn't the one in the hospital. But Baucom didn't see the stabbing—or even how the attack started; the prosecution could not have met its burden based on her testimony alone. And while it would undoubtedly have been easier to serve Baucom with a subpoena at this juncture than it would have been to serve Mejia, at that point, there was no reason for the prosecution to believe Baucom would become uncooperative.

Accordingly, we conclude the prosecution exercised reasonable diligence in serving Baucom and Mejia with subpoenas only after Mejia was released from the hospital.

2. Prosecutorial Misconduct

Characterizing defense counsel as a liar can destroy a fair trial. That is why a prosecutor commits misconduct in closing argument if she distinguishes defense counsel's role of protecting a client from the prosecutor's role of seeking the truth. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183–184; *People v. Bell* (1989) 49 Cal.3d 502, 538 [improper to imply defense counsel is free to deceive the jury]; *People v. Perry* (1972) 7 Cal.3d 756, 789–790 [improper to accuse defense counsel of fabricating a defense].) But as long as she does not attack counsel personally, a prosecutor has wide latitude to attack defense counsel's arguments. (*People v. Benmore* (2000) 22 Cal.4th 809, 846; *People v. Williams* (1997) 16 Cal.4th 153, 221 [" ' "argument may be vigorous as long as it amounts to a fair comment on the evidence" ' "].)

Defendant contends the prosecutor in this case committed misconduct by arguing that defense counsel had woven a creative tale based on the evidence he had to work with. We conclude that defendant forfeited one claim of misconduct by failing to object, and that the remaining comments were proper.

2.1. Legal Principles and Standard of Review

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Here, defendant argues the prosecutor's comments violated state law.

2.2. Proceedings Below

During his closing argument, defense counsel argued that Baucom did not mention a knife in her first 911 call and did not claim defendant had attacked Mejia until her third 911 call. Based on these calls, he argued that defendant did not stab Mejia. Counsel posited instead that Mejia "grabbed the knife, and we will never know whether he intentionally cut himself or whether he accidentally cut himself, but that's exactly what he did. He cut himself and here is the injury."

In rebuttal, the prosecutor argued that defendant's theory was creative but unreasonable:[6]

> Circumstantial evidence is if a witness comes in with a raincoat on and they have droplets of water [on the coat]. That's indicative of it raining outside. And the defense attorney kind of trailed off there, but however when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.
>
> *So the defense attorney looks at what he has to work with*. He has pretty severe injuries. Got a lot of blood.

At this point, defense counsel objected, but the objection was overruled.

The prosecutor continued:

> His client has changed clothes and fled the scene. And he's got two witnesses corroborated by all this physical evidence, all this blood surrounded by Alfredo Mejia and *he's woven together a pretty creative tale*.

Defense counsel objected again, but that objection was also overruled.

The prosecutor went on:

> But it's not reasonable. It's not a reasonable conclusion. Let me see if I followed. [Baucom]

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[6] In the quotations below, the claimed misconduct is set in italic type.

> calls the police and then her husband pulls out a knife even though they don't own any knives besides kitchen knives. [Mejia] pulled out a knife, [Baucom] still calls the police again.
>
> [Mejia] then—what is quite possibly the most extreme like bumbling image ever—cuts himself by accident. Cuts himself so deeply and so badly that he starts to bleed profusely. And you've seen the photo enough, but cuts himself very, very deeply and then comes up with this ruse with his wife. His wife again calls the police and says it was the neighbor … .
>
> Ladies and gentlemen, that does not make sense. … Why would [Mejia] cut himself on purpose? Why would [Mejia] blame [defendant]? Why would [Mejia] involve the police at all if he was the guy who pulled the knife, if he was the guy who cut himself?

The prosecutor also argued, without objection:

> *If the knife hadn't been found, then the defense would get to argue there was no knife.* He caused this himself. It was a preexisting injury. Whatever.
>
> *You can take pieces of evidence and you can weave together a story*. Any possibility. It doesn't mean it's the truth.
>
> [¶] … [¶]

> When a man is bleeding from the arm with a gouged arm and a bloodied knife and a man who [has] just changed his clothes and fled the location and you want to get up here and say he did it himself? *Unreasonable. Unreasonable. It doesn't make sense, because it's not the truth of what happened*.

2.3. Forfeiture

" 'To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. [Citation.]' [Citation.] A failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm." (*People v. Linton* (2013) 56 Cal.4th 1146, 1205; see *People v. Friend* (2009) 47 Cal.4th 1, 29 [counsel need not "object to each instance of misconduct … when the 'misconduct [is] pervasive, defense counsel [has] repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that further objections would have been futile' "].)

Here, defendant concedes that he objected to only two claimed incidents of misconduct—the statements that "the defense attorney looks at what he has to work with" and that counsel had "woven together a pretty creative tale"—and, even then, failed to request an admonition. He argues, however, that objections to the other remarks would have been futile, and he had no opportunity to request an admonition.

As to the objected-to statements, we agree that requesting an admonition would have been futile. By immediately overruling counsel's objections, the court signaled it believed the

prosecutor's remarks were appropriate; it is unlikely, therefore, that the court would have agreed to admonish the jury that these proper remarks were, in fact, improper.

We also agree with defendant that it would have been futile to object to the prosecutor's next two statements—that if "the knife hadn't been found then the defense would get to argue there was no knife" and "[y]ou can take pieces of evidence and you can weave together a story"—because they were substantially the same as the first two statements.

We disagree, however, that it would have been futile to object to the final statement: "Unreasonable. Unreasonable. It doesn't make sense because it's not the truth of what happened." This statement differed from the others, and a timely objection might have produced a different ruling. Nor is there any reason to believe a third objection would have prejudiced defendant.

Accordingly, defendant has forfeited an appellate challenge to the last statement.

2.4. The prosecutor's remarks did not disparage defense counsel.

Turning to the four statements that are properly before us, "[t]he prosecutor did not engage in such forbidden tactics as accusing defense counsel of fabricating a defense or factually deceiving the jury. [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) To the contrary, when the remarks are viewed in context, it is clear "the prosecutor's comment[s were] aimed solely at the persuasive force of defense counsel's closing argument, and not at counsel personally." (*Zambrano*, at p. 1155.)

Certainly, the statements in this case were no more disparaging than those the California Supreme Court has previously upheld. (See *People v. Stanley* (2006) 39 Cal.4th 913, 952 [no misconduct where prosecutor argued counsel " 'imagined things that go beyond the evidence,' " was on an " 'imaginary trip,' " and told the jury a " 'bald-faced lie' "]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [no misconduct where prosecutor said counsel can " 'twist [and] poke [and] try to draw some speculation, try to get you to buy something' "]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215–1216 [argument that defense counsel was talking out of both sides of his mouth and that this was " 'great lawyering' "]; *People v. Breaux* (1991) 1 Cal.4th 281, 306–307 [argument that law students are taught to create confusion when neither the law nor the facts are on their side, because confusion benefits the defense]; *People v. Bell*, *supra*, 49 Cal.3d at p. 538 [argument that defense counsel's job is to " 'confuse' " jurors and " 'throw sand' " in their eyes and that counsel " 'does a good job of it' "].)

We conclude, therefore, that the prosecutor did not commit misconduct.

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.